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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 993

VIRGIL D. BELL, ET AL.,

Petitioners,

vs.

SETON PORTER, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioners, Virgil D. Bell and 52 others who were plaintiffs in this cause, pray that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Seventh Circuit in the above entitled cause.

Opinons Below

The opinion of the Circuit Court of Appeals for the Seventh Circuit (R. 414) is reported in 6 Wage Hour Cases 498. The District Court's memorandum opinion (R. 322) is reported at 66 F. Supp. 49.

Jurisdiction

The judgment of the Circuit Court of Appeals for the Seventh Circuit was entered on December 10, 1946 (R. 420). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

Question Presented

Whether the night hours which petitioners, though permitted to sleep, were required to spend on the employer's premises as part of the employer's fire protection system, were part of their workweek within the meaning of the Fair Labor Standards Act.

Statute Involved

The relevant provisions of the Fair Labor Standards Act of 1938 are set forth in the Appendix.

Statement

The petitioners brought this suit under the Fair Labor Standards Act to recover unpaid overtime compensation, liquidated damages and attorney's fees, for the period from February 27, 1944 to December 1, 1945.

The relevant findings of fact of the District Court (R. 372) may be summarized, briefly, as follows:

The petitioners, 53 in number, were all employed as fire fighters by respondents, a co-partnership styled Sanderson and Porter, during the period from February 27, 1944 to December 1, 1945. Respondents operated the Elwood Ordnance Plant under a cost-plus-fixed-fee contract with the United States Government (R. 372).

The plant was engaged in manufacture and processing of war materials, such as shells, bombs, explosives and munitions, in interstate commerce. The plant site was 23 square

miles in area, divided into three parts—high explosives, loading lines, fuse and booster areas. There were 1100 structures on the premises (R. 372).

The plant maintained its own fire protection department, with three stations at strategic points and fire fighting equipment. From 1941 to February 27, 1944, the firemen worked in three eight-hour shifts, six days a week. In the late summer of 1943, respondents contemplated a two-platoon system, twenty-four hours on, twenty-four hours off—as suggested by the Army. The firemen rejected the plan on two occasions, first on a written vote and then on a voice vote. They had various objections to the plan, and felt that an arrangement of clocking out for 8 hours out of each 24-hour shift would be satisfactory only if accompanied by a very substantial salary increase to compensate them for time at the station without being paid (R. 373-374).

In December 1943, respondents requested another vote. This time, the firemen voted unanimously in favor of the two-platoon plan (R. 374-375). The ballot, Defendant's Exhibit 1, was as follows (R. 290):

"2 Platoon System

Vote by placing your 'X' mark opposite 1, 2 or 3. If 'X' mark is placed opposite 2 or 3, *please give reason.*

1. For 2 platoon system .....
2. Against 2 platoon system .....
   Reason:
3. Cannot work under this system and desire transfer .....
   Reason:

_____ _____

Name Clock"

After reviewing the conflicting evidence, the District Court found that the firemen, before voting, were given to understand that if they wanted to retain their jobs as firemen they would be required to vote for the plan, and if they did not vote for the plan they would be transferred or discharged. The Court further found that a number of petitioners did not understand what their wages would be under the two-platoon plan (R. 375).

The firemen at each station were divided into two platoons. A platoon reported for duty at 7:30 a. m. and remained on duty on the premises until relieved by the other platoon at 7:30 a. m. the following day. Respondents considered the hours from 7:30 a. m. to 11:30 p. m. working time, but did not compensate the firemen for the hours from 11:30 p. m. to 7:30 a. m., when they were permitted to sleep, except for those hours when they were called out to answer fire alarms (R. 376).

No increase in the base pay rate of 85¢ per hour was provided over the three-shift system. Under the two-platoon system, on respondents' computation, the average weekly pay of the firemen was $54.40, compared with $44.20 under the three-shift system, but only 68 men were necessary as compared with 106 to 108 under the three-shift system. There was accordingly a substantial saving of manpower and money to respondents (R. 376-377).

The duties of the firemen were to fight fires, take care of the premises and the equipment, drill, deliver reports and attend school. During the evening, if no duties were assigned, they were permitted to read, listen to the radio, or play cards. After 11:30 p. m. they were free to retire, and no active duties were assigned, except for night alarm duty. However, a few petitioners were assigned actual duties, to pick up laundry and drive dispatchers, between 11:30 p. m. and 7:30 a. m. During these hours as during

the remainder of the day there was a production shift in the plant engaged in the manufacture or processing of bombs, shell loading, and other munitions processes. The greatest explosion and fire at the plant took place between 11:30 p. m. and 7:30 a. m., on June 6, 1942, when 48 men were injured or killed (R. 378-379).

In view of the fire hazard, it was necessary to have a fire department on duty between 11:30 p. m. and 7:30 a. m. (R. 151). The firemen were required to remain in the fire stations or within hailing distance between 11:30 p. m. and 7:30 a. m., as at all other times during the 24-hour period (R. 376). There were instances when petitioners were docked at time and one-half for hours or minutes away from the premises between 11:30 p. m. and 7:30 a. m. On other occasions, firemen were permitted to be absent without deductions from pay, between 11:30 p. m. and 7:30 a. m. (R. 379).

Respondents furnished to the firemen in each station sanitary and sleeping facilities, including steel double bunks, 3-inch cotton mattresses. The same bunks, mattresses, blankets and pillows used by the off-going shift were used by the on-coming shift (R. 377).

The conditions in the three fire stations varied slightly. In each station the plant radio operated continuously, 24 hours a day, close to the sleeping quarters. The radio carried police car calls every few minutes, time reports every half hour, and fire alarms. The volume was twice as loud as the ordinary radio or normal speaking voice, and in one station was even louder. Complaints were made about the volume of the radio at night, and the men were told by their superiors that the volume could not be turned down. The respondents considered the radio "a second line of defense" in the event that the telephone alarm system was

not working. It was also used as a communications system after the men were alerted for a fire (R. 377-378).

The District Court made findings on other conditions in the fire stations. In one station the kitchen and sleeping quarters were part of the same room and the men, having no kitchen sink, washed dishes and utensils in the lavatory. In another station the guards walked through the sleeping quarters to use the toilet facilities. Between the time signals on the half hour, there were radio report calls for squad cars, police radio calls, conversation between guards, fire reports and other noises, which were distinctly audible and fairly understandable in the sleeping quarters. Alarm bells rang incessantly on stormy nights (R. 377-378).

The District Court found that if petitioners had been free to sleep elsewhere they would not have chosen sleeping quarters similar to those furnished by respondents (R. 378).

The District Court stated as a conclusion of law that between 11:30 p. m. and 7:30 a. m. petitioners were under the control of respondents, were required to and did hold themselves to instant readiness to serve when called, and spent the time upon the premises predominantly for the benefit of the respondents as an incident of the employment and as the only practical means for getting instant service in case of fire. The District Court entered judgment for petitioners (R. 381-382).

The Circuit Court of Appeals stated in its opinion that petitioners, in consideration of their employment as firemen, were willing to sleep on the premises and keep available for duty, that they had a contract to wait to be engaged. It reversed with instruction to dismiss the complaint (R. 414).

Specification of Errors To Be Urged

The Circuit Court of Appeals for the Seventh Circuit erred:

1. In failing to affirm the ruling of the District Court, which held that the hours of the sleeping period were spent by petitioners on the employer's premises predominantly for the benefit of the employer, and were therefore part of the workweek.

2. Alternatively, in failing to give effect to the District Court's findings as to the inadequacy of the sleeping accommodations, either by affirming, or remanding for specific findings on whether the employees secured normal rest.

3. In treating the circumstances of this case as an agreement to settle the questions whether certain activity constitutes work or employment, in view of all the facts surrounding the employees' vote, including the employer pressure found by the District Court.

4. In giving undue effect and significance to such an agreement, assuming one to exist.

5. In reversing the judgment of the District Court with instructions to dismiss the complaint.

Reasons For Granting the Writ

The petitions for certiorari in this case, and in *Bowers* v. *Remington Rand*, No. 995, and *Rokey* v. *Day and Zimmerman, Inc.*, 157 F. (2d) 734 (C. C. A. 8th), No. 994, all relate to the application of the Fair Labor Standards Act to "two platoon" systems of fire protection, under which firemen stay at the station twenty-four hours, and go off for twenty-four hours. The reasons for granting the writ as presented

in this petition are in large part the same as those presented by the other two petitions, and this discussion underlies the three applications.

1. The decision below misinterprets and is in conflict with the applicable decisions of this Court.

In *Armour & Co.* v. *Wantock*, 323 U. S. 126, and *Skidmore* v. *Swift & Co.*, 323 U. S. 134, this Court considered private fire protection systems under which fire fighters remained at a factory for 24 hours and then went off duty for 24 hours. This Court affirmed a decision applying the Fair Labor Standards Act to hours spent in playing cards and other pleasurable pursuits, observing (323 U. S. at 133): "Readiness to serve may be hired, quite as much as service itself, and time spent lying in wait for threats to the safety of the employer's property may be treated by the parties as a benefit to the employer. Whether time is spent predominantly for the employer's benefit or for the employee's is a question dependent upon all the circumstances of the case." *Armour & Co.* v. *Wantock, supra.* It held that whether waiting time was working time under the Act is "a question of fact to be resolved by appropriate findings of the trial court" *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 136.

In the present case the District Court applied the decisions in the *Wantock* and *Skidmore* cases. It made findings of fact and held that the time spent by petitioners upon the premises of respondents between 11:30 p. m. and 7:30 a. m. was predominantly for the benefit of respondents, as the only practical means for getting instant service in case of fire (R. 381). In reversing that ruling, the court below rendered a decision in conflict with the *Wantock* and *Skidmore* cases.

The court below stated (R. 418) that the *Wantock* and *Skidmore* cases were not "controlling" because they did not

involve "sleeping time."[1] The applicable criteria and legal guides are plainly the same, however, whether the hours are devoted to sleep or amusement. If the hours are spent on the employer's premises and subject to his control "predominantly for the employer's benefit", they are part of the workweek. The application of this principle may yield a different result with a different state of facts, but this Court neither indicated nor intended that a different legal principle would apply. In applying the principles of the *Wantock* and *Skidmore* cases, the District Court made "appropriate findings of fact" and held that the night hours were spent on respondents' premises predominantly for the benefit of respondents. In reversing that judgment the court below exceeded its province as an appellant tribunal,[2] and rendered a decision in conflict with the applicable decisions of this Court.

The conclusion of the District Court was in accordance not only with law and logic but also with common understanding. The real service demanded of a fireman is that he be available, and that he be ready in any emergency to apply his special training and to expose himself to great danger. Throughout the twenty-four hours his time, apart from a few routine duties, is spent primarily in waiting for the

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[1] The record presented to this Court in the *Wantock* and *Skidmore* cases did not involve night hours designated as sleeping periods. However, in the *Wantock* case below, the Circuit Court of Appeals for the Seventh Circuit had indicated doubt whether a distinction could be drawn between employees sleeping and employees playing games, both subject to call. *Wantock* v. *Armour & Co.*, 140 F. (2d) 356, 357.

[2] A similar subsidiary error appears in the *Rokey* case where the trial court directed a verdict instead of submitting the case to those charged with finding the facts. The Circuit Court of Appeals said that directing a verdict was tantamount to a finding of every material issue of fact and law in favor of defendant, citing *Phenix Ins. Co.* v. *Kerr*, 129 Fed. 723 (C. C. A. 8th). The *Kerr* case was based on the old rule that when both parties move for a directed verdict, trial by jury is waived. That rule was abolished by Rule 50(a) of the Federal Rules of Civil Procedure.

alarm. His service is his attendance at the station. Unlike men in almost all other types of employment the fireman's value when sleeping at the station house is comparable to his service at other times, especially where his station is on the premises of a munitions plant. National statistics on "hours of work per week" and "average hours per work-week" for firemen employed by municipalities include all twenty-four hours under the two-platoon system, and do not exclude hours spent in sleeping at the station house. See *Fire Department Statistics,* Municipal Year Book, 1946, p. 365 *et seq.* As respondents' fire chief said: "It is a general procedure at nearly every fire department to work 24 hours" (R. 152). Any question as to the appropriate wage rate applicable to these night hours arises only after they have been held part of the workweek.

The Administrator of the Wage and Hour Division took the position in the court below, and the Circuit Court of Appeals for the Eighth Circuit held in *Rokey* v. *Day and Zimmerman, Inc.,* 157 F. (2d) 734, that the availability of ample hours of uninterrupted sleep is controlling on whether the hours are part of the workweek. That doctrine does not support the ruling of the court below, since the findings of the District Court show that petitioners did not have ample hours of uninterrupted sleep. If the *Rokey* doctrine had been applied, the court below would not have ordered the dismissal of the complaint. This point is more fully developed in part 3 of this petition for certiorari.

Furthermore, the doctrine of the *Rokey* case is not a sound application of the principles of the *Wantock* and *Skidmore* cases. The Administrator is apparently in some doubt on the matter. His brief *amicus curiae* filed in this Court in the *Skidmore* and *Wantock* cases states that the Administrator has concluded that the more reasonable view is that the usually uninterrupted eating and sleeping

periods might be excluded, but admits (p. 13) that "the contention that all of such time should be held compensable is not without substance.

The availability of ample hours of uninterrupted sleep is a factor which shows some benefit to the employees but it surely is not conclusive. More significant are these factors which show the predominance of benefit to the employer: In view of the fire hazard at this plant engaged throughout the twenty-four hours in manufacturing bombs and other munitions, it was necessary to have a fire department "on duty" between 11:30 p. m. and 7:30 a. m. (R. 151). The benefit in increased protection to the employer extends beyond the mere pecuniary reduction of insurance premiums (see 323 U. S. at 131), or pecuniary equivalent to self-insurers in the reduction of the actuarial risk. Indeed, the employer docked employees at time and one-half for hours off the premises during the night period, in order to insure their presence (R. 379). The employees were not given residences at the plant.[3] They were deprived of the liberty and privacy of being with their families at their residences, and were required to sleep in uncomfortable and dangerous conditions at an ordance plant (R. 377-379). If an employer hires separate night forces to obtain the benefits of fire protection, he cannot remove their hours from the coverage of the Act simply by providing adequate sleeping accommodations. In their night hours, petitioners are in the same position as

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[3] The only illustrations in Interpretative Bulletin No. 13 of the Wage and Hour Division (Wage and Hour Manual 1942 ed. p. 123) of hours excluded from the workweek are cases where the employee works in his own home (paragraph 6), or where the employee "makes his home at his employer's place of business" (paragraph 7). Paragraph 8 relates to employees "subject to call after the completion of their regular working day"; their time is hours worked "if the employee is required to remain on call in or about the place of business of the company", but not if he merely leaves word where he can be reached.

such night forces. They were required by the employer to spend these hours at a prescribed place on the employer's premises, subject to the employer's control, and for the employer's benefit. The hours are part of their workweek.

2. In this aspect of the case, the rulings both of the court below, and of the Circuit Court of Appeals for the Eighth Circuit in the *Rokey* case, holding "sleeping periods" as not working time under the Act, not only misapply the decisions of this Court but also conflict in principle with *Seneca Coal & Coke Co.* v. *Lofton*, 136 F.(2d) 359 (C. C. A. 10th), certiorari denied, 320 U. S. 772. That case held that the half-hour "lunch time" of a night watchman at a coal mine could not be excluded in determining hours worked as the employer contended. The Administrator of the Wage and Hour Division classifies eating and sleeping together as private pursuits, and regards adequate time therefor as excluded from the workweek.

The facts, as set forth by the District Court in *Lofton* v. *Seneca Coal & Coke Co.*, 2 Wage Hour Cases 669 (N. D. Okla.), showed that there was an oral contract that the watchman would work from 4:30 p. m. to 6:30 a. m., defendant's rules allowing each employee to take one-half hour off for lunch. The District Court found (2 Wage Hour Cases at 675):

> • • • that plaintiff's employment was at night and isolated, and that plaintiff could not leave his place of employment during the lunch period, but was required by circumstances to remain at his place of work, so that defendant received the benefit of his presence as night watchman during the lunch period; and that for this reason defendant was not entitled to deduct the half hour lunch period in arriving at plaintiff's overtime compensation.

The same conclusion is reached as to sleeping time of a watchman in *Whitsitt* v. *Enid Ice and Fuel Co.*, 5 Wage Hour Rept. 636 (W. D. Okla.).

3. Even under the doctrine of *Rokey* v. *Day and Zimmerman, Inc.*, 157 F.(2d) 734, where the Circuit Court of Appeals for the Eighth Circuit applied the view of the Administrator of the Wage and Hour Division that whether hours of sleep on the employer's premises constitute working time depends on whether there are ample hours of uninterrupted sleep, the court below would not have dismissed the complaint but would have affirmed, or at least remanded the cause. Accordingly, the result below is in conflict with the *Rokey* case.

The District Court made findings that the intra-plant radio operated throughout the night, with frequent calls, at a volume twice as loud as the normal radio or speaking voice and at one station even louder, and he made a number of other findings on the unsanitary, noisy and uncomfortable conditions (R. 377-378). He found as true the various statements by petitioners as to the conditions which they said interrupted their sleep (*e. g.* R. 47 ff, 62 ff, 92, 106, 111, 119-120, 124 ff, 134). His findings did not accept the testimony, given by the two witnesses for respondent who said they were able to sleep, that the volume of the radio was only a little louder than an ordinary conversational tone (R. 198, 204).

The court below stated that the District Court had not found that the sleeping quarters were inadequate or of such a character that the men were unable to obtain normal rest, but it admittedly placed no significance on that point (R. 419). The District Judge thought that the adequacy of the sleeping accommodations was not controlling (R. 332). If he had regarded such an express finding as signifi-

cant, it is plain that he would have found the sleeping conditions inadequate.

The Administrator of the Wage and Hour Division also took the view in his brief, *amicus curiae,* filed with the Circuit Court of Appeals below, that the District Court's findings support a judgment for petitioners on the ground that the sleeping accommodations were inadequate to permit a normal night's sleep.[4] Application of the *Rokey* doctrine by the court below would have precluded dismissal of the complaint.

4. After stating that the *Wantock* case was not controlling, the court below, without considering the application of the principles of the *Wantock* and other decisions, disposed of this case on the same ground it used in *Bowers* v. *Remington Rand,* that the employees are bound by their contract of employment as an agreement to settle the question whether certain activity or non-activity constitutes work or employment, citing *Tennessee Coal Co.* v. *Muscoda Local,* 321 U. S. 590.

That ruling should be reviewed by this Court for two reasons. First the court below proceeded in disregard of and in conflict with the applicable decisions of this Court. And then it went on to make a ruling on a problem of importance which has been expressly reserved by this Court.

The court below. in citing the *Tennessee Coal Co.* case, presumably referred to the passage in that opinion where this Court stated that it was not there concerned with the

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[4] That brief stated (p. 17): "However the specific findings made by the District Court concerning the conditions existing in the sleeping quarters might justify the conclusion that in the ordinary course of events the firemen would not be able to obtain a normal night of rest in adequate and comfortable accommodations. Thus while the reasoning of the District Court is inconsistent with the principles set forth in this brief, the decision may be consistent with the Administrator's interpretation if the sleeping accommodations furnished were inadequate to permit a normal night's sleep."

effect that customs and contract might have in borderline cases where the other facts rise to serious doubts as to whether certain activity or non-activity constitutes work or employment (321 U. S. at 603).

Assuming that the employees' vote in favor of the two-platoon plan in this case represented an employment agreement, the court below erred in considering only the employment agreement and holding it conclusive. It was the duty of the court to proceed first to consider the facts of the activity and non-activity involved, in accordance with the principles governing the application of the Act, and then to consider whether the agreement could be regarded as consonant with those principles. *Tennessee Coal Co.* v. *Muscoda Local, supra; Jewell Ridge Corp.* v. *Local,* 325 U. S. 161; *Anderson* v. *Mt. Clemens Pottery Co.,* 327 U. S. —, 90 L. ed. 1114. The failure of the court below to proceed in that manner is in conflict with these decisions. An agreement to leave the employees uncompensated for time spent on the employer's premises at his insistence, under his control, and primarily for his benefit is of no effect. *Ibid.* The governing principles, set forth in the *Wantock* and *Skidmore* cases, show these night hours were part of the workweek.

Even where a court, after considering the applicable principles, regards the facts of a case as giving rise to serious doubts whether certain activity or non-activity constitutes work, it should not give conclusive effect to an employment agreement. The question of the proper effect of such an agreement was reserved in the *Tennessee Coal Co.* case and the other cases cited. Such an agreement would seem properly to be not a conclusive element but rather one of the facts before the court indicating whether the hours were spent on the employer's premises predominantly for the benefit of the employer or employee. Cf. *Skidmore* v. *Swift & Co.,* 323 U. S. 134 at 137. Even an

express recital that certain hours will not be compensated is not as clear as the plant's requirement that the employees remain on the premises and the employer's docking them at time and a half for absences during those hours in order in insure their presence (R. 379).

But in any event this Court's reservation in the *Tennessee Coal Co.* case and the *Jewell Ridge* case, related to "bona fide contracts or customs to settle difficult and doubtful questions as to whether certain activity or non-activity constitutes work" (325 U. S. at 169). This Court surely did not intend to include in that category of contracts an arrangement like that revealed in this case. Respondents circulated a voting ballot (R. 290), not an offer binding respondents upon acceptance. The plan was proposed on the flat basis that the night hours would not be compensated. There was no discussion with the firemen whether those were hours of duty or whether any account should be taken of their enforced presence. No increase in hourly rate was provided; and the employers saved substantial amounts by obtaining the uncompensated presence of firemen and thus reducing the number of firemen (R. 374-377).

More significantly, the facts show that the favorable vote was obtained by the employer's use of coercive pressure. The court below referred only to the employees' vote in favor of the two-platoon system in December 1943 (R. 417). It ignored completely the surrounding facts set forth in the District Court's findings (at R. 375) and opinion (at R. 324-325, 66 F. Supp. at 51). The employees rejected the plan on two previous occasions, objecting both to the lack of pay while they were at the fire station, and to separation from their families (R. 289, 374). The District Court found that the firemen finally voted in favor of the plan only after "the firemen, before voting, were given to understand that if they wanted to retain their jobs as

firemen they would be required to vote for the plan, and, if they did not vote for the plan, they would be transferred to another department in the plant or discharged" (R. 375).

The Court should grant certiorari to correct the failure to apply its decisions, and to provide enlightenment on the scope of a matter previously left open—the effect to be given to certain contracts or customs, and the nature of contracts or customs which may be given that effect. The matter has relevance to agreements and arrangements now being evolved or continued throughout the Nation.

5. Informal estimates of the Department of Justice are that approximately 25 pending suits, distributed over five circuits, concern the application of the Fair Labor Standards Act to these double platoon plans. It would aid the administration of this considerable body of Federal litigation if this Court were to grant the petitions for certiorari in this case, and in the *Rokey* and *Bowers* cases, review the divergent approaches of the opinions in the Circuit Courts of Appeals, and clarify the relevant principles of law.

Conclusion

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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February, 1947.

APPENDIX

Statutory Provisions Involved

The pertinent provisions of the Fair Labor Standards Act of 1938 (c. 676, 52 Stat. 1060, 29 U. S. C., sec. 201) read as follows:

Section 3. As used in this Act—

* * * * * * *

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(e) "Employee" includes any individual employed by an employer.

* * * * * * *

(g) "Employ" includes to suffer or permit to work.

* * * * * * *

Sec. 7(a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section.

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one-half times the regular rate at which he is employed.